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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. EDUARDO SANTOYO OROZCO, Defendant and Appellant.	C078165 (Super. Ct. No. CRF131932)

Defendant Eduardo Santoyo Orozco was convicted by jury of two counts of robbery (Counts 1 and 3) and one count each of grand theft from a person (Count 2), assault with a deadly weapon (Count 4), and active gang participation (Count 5). The jury also found defendant committed the crimes charged in the first four counts for the benefit of, at the direction of, or in association with a criminal street gang. He was sentenced to serve an aggregate determinate term of 15 years in state prison.

On appeal, defendant contends: (1) the evidence was insufficient to support his conviction for assault with a deadly weapon because there was no evidence he intended to assault the victim; (2) the standard jury instruction defining the crime of assault with a deadly weapon (CALCRIM No. 875) erroneously defined the mental state required for conviction of that crime; and (3) in light of our Supreme Court's recent decision in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), defendant's gang participation conviction and gang enhancement findings must be reversed because the prosecution presented no evidence of an "associational or organizational connection" (*id*. at p. 71) between the Norteño subset of which he was a member and the Norteño subset whose members committed the crimes satisfying the predicate offense requirements of the gang statute.

We agree defendant's gang participation conviction and gang enhancement findings must be reversed for insufficient evidence following *Prunty*.[1] His remaining

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[1] Following *Prunty*, *supra*, 62 Cal.4th 59, our Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665, holding: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686, fn. omitted.) Shortly before *Prunty* was decided, our Supreme Court also decided *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*), holding routine gang affiliation questions asked during the process of booking the defendant into jail amounts to "interrogation" for purposes of triggering a defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*) because such questions are "reasonably likely to elicit an incriminating response" in light of California's "comprehensive scheme of penal statutes aimed at eradicating criminal activity by street gangs," and therefore, a defendant's un-*Mirandized* responses to such questioning is inadmissible against him or her during the prosecution's case-in-chief. (*Elizalde*, *supra*, 61 Cal.4th at pp. 538-540.) Certain evidence admitted through the

contentions fail. We shall therefore reverse the gang participation conviction and gang enhancement findings, otherwise affirm, and remand the matter for resentencing.

FACTS

Defendant, a Norteño gang member, took property from three separate people on three separate occasions during a four-day period of time in May 2013. Each time, defendant set up a meeting with the victim, purportedly to buy a small electronic device the victim had listed for sale on the online classifieds Website, Craigslist. He then took the property from the victim without paying for it. Two of those takings were accomplished by means of force or fear and amounted to robbery. Because defendant's challenge to the sufficiency of the evidence involves only one of the three incidents, a robbery followed by an assault with a deadly weapon, we provide a factual summary of only this incident.[2]

On May 13, 2013, Richard Crawford drove from Lincoln to Woodland in an attempt to sell a Kindle Fire he had listed for sale on Craigslist. He lived with his parents and was selling the device to help them pay rent for the month. Defendant answered the ad using the name "Alex" and asked Crawford to bring the Kindle to Woodland. Crawford initially refused, but agreed to do so after defendant promised to pay him $20 in gas money regardless of whether he ended up purchasing the Kindle. They agreed to meet in the parking lot of the mall in Woodland.

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gang expert's testimony in this case arguably violated these decisions. However, because we are required to consider erroneously admitted evidence in assessing the sufficiency of the evidence (*People v. Story* (2009) 45 Cal.4th 1282, 1296), and because the gang crime conviction and gang enhancement findings must be reversed as unsupported by sufficient substantial evidence under *Prunty*, we need not determine the merits of these arguable violations of *Elizalde* and *Sanchez*.

[2] A summary of the gang evidence, the sufficiency of which defendant also challenges, will be provided in the discussion portion of the opinion.

Crawford drove to the meeting place alone. Defendant was driven there by Oscar Gonzalez. When they arrived, defendant was seated in the front passenger seat and identified himself as Alex. Crawford got out of his car and shook defendant's hand. Defendant then pulled out a wallet to show Crawford he had money to make the purchase, placed the wallet on the dashboard, and got out of the car. Defendant and Crawford then walked to the latter's trunk, where the Kindle was located. Defendant inspected the device and the two negotiated a price. They then returned to Gonzalez's car, defendant got in with the Kindle, and Crawford stood beside the open passenger door awaiting payment. Defendant moved the wallet from the dashboard to his lap, as if to take out money to pay Crawford. He then looked up at Crawford and "smirked" as the car "took off."

As the car drove away, Crawford instinctively reached out with both of his hands. At the same time, the passenger door slammed shut, trapping one of his hands in the door. Crawford was dragged alongside the car for "10 to 15 feet" before defendant opened the door, releasing Crawford's hand, and causing him to impact the pavement as defendant and Gonzalez made their escape with the Kindle. The impact dislocated Crawford's left shoulder, requiring surgery to repair the injury and several months of physical therapy.

Crawford was able to provide law enforcement officers with the license plate number of the car that subsequently led them to an address where Gonzalez was taken into custody. Crawford positively identified Gonzalez as the driver during an in-field show-up. He also identified defendant as the passenger who took the Kindle during a subsequent photo lineup that was used to obtain a search warrant for a different address, where the Kindle was recovered. Defendant does not challenge the sufficiency of the evidence establishing his identity. As we explain immediately below, his challenge to the sufficiency of the evidence turns on whether or not his actions of closing the car door on

Crawford's hand, after which the car dragged him several feet, and then releasing his hand from the door, causing the impact with the pavement, satisfies the elements of assault with a deadly weapon.

DISCUSSION

I

Sufficiency of the Evidence

Defendant brings two sufficiency of the evidence claims, one challenging the sufficiency of the evidence supporting his assault with a deadly weapon conviction, and the other challenging the sufficiency of the evidence supporting his gang crime conviction and gang enhancement findings in light of our Supreme Court's recent decision in *Prunty*, *supra*, 62 Cal.4th 59. We address each in turn, rejecting the first and concluding the second has merit.

A.

Standard of Review

" 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]' [Citations.] All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. [Citation.] Reversal on this ground is unwarranted unless ' "upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' [Citation.] This standard applies whether direct or circumstantial evidence is involved. [Citation.]" (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 226-227.) " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court

which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

B.

Assault with a Deadly Weapon

Defendant argues the evidence was insufficient to support his assault with a deadly weapon conviction because "[t]here was no evidence [he] intended for [Crawford] to get his [hand] stuck in the door" and "[t]he door opened and [Crawford's] hand was released after the vehicle traveled just a few feet." From this, defendant concludes: "The evidence was insufficient as a matter of law to prove [he] intended to assault [Crawford]." Defendant is mistaken.

"[T]he 'mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery.' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 782 (*Williams*).) While "assault requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another," it does "not [require] a specific intent to cause injury." (*Williams, supra,* 26 Cal.4th at p. 782.) Where the defendant drives or otherwise uses a vehicle to commit such an act with the requisite mens rea, the crime is assault with a deadly weapon. (See, e.g., *People v. Russell* (2005) 129 Cal.App.4th 776, 782.)

Thus, contrary to defendant's argument on appeal, he need not have intended to close the car door on Crawford's hand in order to possess the requisite mens rea for assault with a deadly weapon. Even accepting his assertion he had no such intent, and merely wanted to close the door to make his getaway, once Crawford's hand got stuck in

the door and the car began dragging him alongside of it, defendant must have known opening the door while Crawford was still being dragged would probably and directly result in an injurious contact between Crawford and the pavement, which is precisely what happened. On these facts, we must conclude sufficient substantial evidence supports the jury's implied finding defendant possessed the requisite mens rea for assault with a deadly weapon.

C.

Gang Crime and Enhancements

Defendant also challenges the sufficiency of the evidence to support his gang participation conviction and the gang enhancement findings. Specifically, he argues the prosecution presented no evidence of an "associational or organizational connection" (*Prunty, supra*, 62 Cal.4th at p. 71) between the Norteño subset of which he was a member and the Norteño subset whose members committed the crimes satisfying the predicate offense requirements of the Street Terrorism Enforcement and Prevention (STEP) Act. (Pen. Code, § 186.20.)[3] We agree.

1. *The STEP Act*

The STEP Act was enacted in 1988 "to seek the eradication of criminal activity by street gangs." (§ 186.21.) The STEP Act creates both a substantive offense for active participation in any criminal street gang (§ 186.22, subd. (a)) and an enhancement to be imposed where any person is convicted of a felony committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)).

The elements of the substantive offense are: (1) "active participation in a criminal street gang, in the sense of participation that is more than nominal or passive," (2)

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3 Undesignated statutory references are to the Penal Code.

"knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity," and (3) "the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.) The elements of the gang enhancement are: (1) commission of a felony "for the benefit of, at the direction of, or in association with any criminal street gang," and (2) with "the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b).)

"To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) "A 'pattern of criminal gang activity' is defined as gang members' individual or collective 'commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more' enumerated 'predicate offenses' during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons. [Citations.]" (*Ibid.*)

2. *Gang Evidence Adduced at Trial*

To satisfy the "criminal street gang" requirement of both the gang crime and the gang enhancements, Detective John Perez testified the Norteño gang has more than three members, is associated with the Nuestra Familia prison gang, and uses both the number 14 and the color red as common symbols. Norteño gang members also share a common enemy, Sureño gang members, who are associated with the Mexican Mafia prison gang, the number 13, and the color blue. As the detective explained, "a lot of these individuals

[i.e., prison gang members] would come out, and they would assume the role of -- I don't want to use the term as 'a ranking system,' but they would be looked at as a more influential individual. And because of that, because of their experience, they were able to set up, in the neighborhoods that they came from, their own gangs, their own sets. And it evolves and repeated itself over time."

The Bakersfield area is generally considered the dividing line between Norteño and Sureño territory, although there are more Sureño gang members north of that line than the reverse "due to families migrating up north." According to the detective, Norteño gang members in Woodland claim the entire city as their territory and refer to themselves as "Varrio Bosque Norteños." There are also Sureño gang members in Woodland who claim certain parts of the city as their territory, such as the Yolano-Donnelly housing area and the area of 6th Street.

Detective Perez also testified one of the Norteño gang's primary activities is the commission of one or more of the criminal acts listed in section 186.22, subdivision (e), including robbery, assault with a deadly weapon, shooting at inhabited dwellings, and the trafficking of narcotics.

The detective then testified regarding four predicate offenses. The first predicate offense involved two Norteño gang members, including Robert Codarre, and some other unidentified individuals, who confronted two Sureño gang members and chased them into a backyard, where they caught up with one of the fleeing Sureños and assaulted him with a stun gun and other objects, earning Codarre the gang moniker, "Zapper." Codarre pleaded no contest to assault by means of force likely to produce great bodily injury and admitted a gang enhancement allegation. The second predicate offense involved a vehicle stop of four Norteño gang members, including Carlos Hernandez Chavarrin, during which a loaded Tec-9 semi-automatic handgun was found. Among other crimes, a jury convicted Hernandez Chavarrin of possession of a firearm by a felon and found a

gang enhancement allegation to be true. The third predicate offense involved a fight that broke out at a gas station in Woodland between various Norteño gang members, including Derick Garcia, and various Sureño gang members, during which Garcia hit one of the Sureños in the face with a shovel. Garcia pleaded no contest to assault by means of force likely to produce great bodily injury. The fourth predicate offense involved five Norteño gang members, including Juan Reyes, who drove over to a known Sureño's house in the Yolano-Donnelly housing area, shouted out gang-related slurs, and fired several rounds into the house. Among other crimes, a jury convicted Reyes of shooting at an inhabited dwelling and found a gang enhancement allegation to be true.[4]

Turning to defendant, Detective Perez testified he was an active Norteño gang member from Arbuckle, a small town about 30 miles north of Woodland. According to the detective, there is a Norteño subset in Arbuckle that goes by the name "Varrio Arbas," although he acknowledged he was "not that familiar" with that specific subset. This opinion was based in part on defendant's Facebook profile that included gang-related posts and various photographs of defendant and others wearing red clothing, including some in which gang signs were being displayed. The detective's opinion was also based on the fact that when defendant was arrested, he was in the company of another individual, Gonzalez's cousin Ivan, who admitted to police he was a Varrio Arbas Norteño. When defendant was being handcuffed, he yelled, "Norte" and said, "that was for my cousin," apparently referring to Ivan. The detective also relied on photographs taken of a table on which defendant's wallet and cell phone were

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[4] While not designated a predicate offense, Detective Perez also testified to an incident involving both Garcia and Codarre, during which they joined with eight other Norteño gang members in shooting at a house on 6th Street in Woodland.

found at the time of his arrest. Gang-related graffiti was written on the table, including the number 14, the word "Arbas," the letter "N," and the area code "530," each written or outlined in red. Red clothing was found in the same room as the table. Defendant also admitted to being a Norteño gang member during his jail classification interview.[5] Similar information caused the detective to opine Gonzalez was also a Norteño gang member.

Finally, Detective Perez testified that a hypothetical situation in which a gang member joins with another gang member or gang members in a scheme to pose as a buyer of electronic devices through answering Craigslist ads and then robs the would-be sellers of their property would do so for the benefit of the gang regardless whether he announces his gang membership during the robberies.

3. *"Associational or Organizational Connection"*

In *Prunty*, *supra*, 62 Cal.4th 59, our Supreme Court held that where, as here, "the prosecution's case positing the existence of a single 'criminal street gang' . . . turns on the existence and conduct of one or more gang subsets, . . . the prosecution must show some associational or organizational connection uniting those subsets." (*Id.* at p. 71.) The court continued: "That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group. Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior

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[5] While this admission was arguably admitted into evidence in violation of *Elizalde*, *supra*, 61 Cal.4th 523, in "reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, [we] must consider *all* of the evidence presented at trial, including evidence that should not have been admitted." (*People v. Story*, *supra*, 45 Cal.4th at p. 1296.)

showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization. [¶] Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same 'group' that meets the definition of section 186.22(f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22[, subdivision] (b). But it is not enough . . . that the group simply shares a common name, common identifying symbols, and a common enemy. Nor is it permissible for the prosecution to introduce evidence of different subsets' conduct to satisfy the primary activities and predicate offense requirements without demonstrating that those subsets are somehow connected to each other or another larger group." (*Id*. at pp. 71-72, fns. omitted.)

Here, substantial evidence establishes defendant was a Norteño gang member from the Varrio Arbas subset out of Arbuckle. He committed the crimes charged in this case with at least one other Norteño gang member, also apparently from Varrio Arbas, and was arrested in the company of a third Varrio Arbas gang member. While Detective Perez did not specifically state whether the Norteño gang members who committed the predicate offenses were from the Varrio Bosque subset, at least two of these offenses were committed in Woodland, and viewing his testimony in its entirety leads us to believe the others were also committed there. Indeed, the detective knew quite a bit about the Varrio Bosque subset and their turf war with Sureño transplants in that city, but admittedly knew very little about the Varrio Arbas subset. From this, we can reasonably conclude the predicate offenses were likely committed by gang members from the Varrio Bosque subset. More importantly, there is no evidence these crimes were committed by gang members from Varrio Arbas.

Accordingly, under *Prunty*, *supra*, 62 Cal.4th 59, there must be substantial evidence "demonstrating that [the Varrio Bosque and Varrio Arbas] subsets are somehow

connected to each other or another larger group." (*Id*. at p. 72.) The only connection established by Detective Perez's testimony was the common lineage of all Norteño gangs from the Nuestra Familia prison gang, their shared symbols, and their common enemy. This is insufficient. As our Supreme Court explained: "The STEP Act's 'organization, association, or group' requirement must . . . be satisfied by evidence that goes beyond proof that three or more persons share a 'common name or common identifying sign or symbol.' (§ 186.22[, subdivision](f).) [¶] Nor does the Act's text or structure support the conclusion that a common enemy (or similar evidence of a loose common ideology) is enough to demonstrate that various subsets are part of a single criminal street gang." (*Id*. at p. 75.) Which leaves us with lineage. Notwithstanding this common lineage, the detective agreed with the prosecutor's characterization of different subsets as "distinct gang entities." And while the detective testified defendant is primarily a Norteño, when he was asked who the "leader" of defendant's gang was, the detective explained that instead of an overarching leader, gang subsets have more and less influential members within those subsets and he did not know who was "most influential" in the Varrio Arbas subset. There was no testimony that there is a formal structure or hierarchy between the various subsets and either the overarching Norteño gang or its prison counterpart Nuestra Familia. Nor did the detective testify to specific facts "suggest[ing] the existence of behavior reflecting such a degree of collaboration, unity of purpose, and shared activity [either between Varrio Bosque and Varrio Arbas or between each subset and a larger Norteño entity] to support a fact finder's reasonable conclusion that a single organization, association, or group is present." (*Id*. at p. 78.)

Simply put, the evidence is insufficient to establish the Norteño criminal street gang in which defendant actively participated and benefitted by committing the crimes in this case was "the same 'group' that . . . committed the predicate offenses" within the

meaning of section 186.22. (*Prunty, supra*, 62 Cal.4th at p. 71.) We must therefore reverse the gang crime conviction and gang enhancement findings.

II

Instructional Error

Defendant's final contention is that the trial court prejudicially erred and violated his state and federal constitutional rights by instructing the jury with CALCRIM No. 875, the standard instruction defining the crime of assault with a deadly weapon. Specifically, he argues that instruction "erroneously defined the intent required for assault" to require only negligence. However, as defendant acknowledges, the language with which he takes issue (i.e., "[w]hen the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone") closely tracks language from our Supreme Court's decision in *Williams, supra*, 26 Cal.4th at pages 787-788, describing the intent required to commit an assault with a deadly weapon.[6] Intermediate appellate courts must follow decisions of the state's highest court and have no authority to rule otherwise. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, we must reject defendant's challenge to CALCRIM No. 875.

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[6] Defendant's argument is based on this court's opinion in *People v. Wright* (2002) 100 Cal.App.4th 703, in which we criticized the definition of assault set forth in *Williams*, concluded an assault instruction that does not require the defendant to have intended to commit a battery would erroneously permit a jury to convict a person of negligent assault, but nevertheless affirmed the judgment based on our obligation to follow *Williams, supra,* 26 Cal.4th 779. (*Wright* at pp. 706, 711-724.) Defendant recognizes we are still bound to follow *Williams*, but raises the issue to preserve his right to petition our Supreme Court for review, hoping it will reconsider its holding in *Williams*.

DISPOSITION

Defendant's gang participation conviction in Count 5 and the gang crime enhancement findings attached to Counts 1 through 4 are reversed. The judgment is otherwise affirmed and the matter is remanded to the trial court for resentencing.

/s/
HOCH, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
DUARTE, J.